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## No Harm, No Rule: The Muddy Waters of Agency Policy Statements and Judicial Review under the Missouri Administrative Procedure Act

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## Notes

# No Harm, No Rule: The Muddy Waters of Agency Policy Statements and Judicial Review Under the Missouri Administrative Procedure Act

*Missouri Soybean Association v. Missouri Clean Water Commission*<sup>1</sup>

### I. INTRODUCTION

State and federal agencies cooperate in a dizzying array of government programs regulating everything from environmental protection, conservation, and health care, to housing, social security, education, and welfare.<sup>2</sup> Agencies take a series of interrelated actions including issuing policy statements and promulgating rules in order to implement these lengthy, complex, and often highly technical programs.<sup>3</sup> The volume and variety of actions state and federal agencies take to implement a given regulatory scheme sometimes makes it difficult for courts to wade through the muddy waters shrouding the distinction between informal agency policy statements and formal agency rules. Despite the difficulty, drawing this distinction is critical because it determines what procedures an agency must follow to implement the scheme, whether judicial review of agency actions is available, and whether the statement is binding on the agency and the public.<sup>4</sup>

The Missouri Supreme Court waded into these muddy waters in the context of a challenge to a state agency's implementation of the federal Clean Water Act.<sup>5</sup> The court held that Missouri's impaired waters list was an agency policy statement, rather than a rule, and that the challenge to the list was not ripe.<sup>6</sup> This Note will examine the potential impact of the court's decision on Missouri law, agency behavior, and the public's role in agency

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1. 102 S.W.3d 10 (Mo. 2003) (en banc).

2. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1365 (1992); see also *New York v. United States*, 505 U.S. 144, 167-68 (1992) (collecting examples of “cooperative federalism”).

3. 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.16, at 392 (3d ed. 1994).

4. 1 *id.* § 6.2, at 228-29.

5. *Mo. Soybean Ass'n*, 102 S.W.3d at 14-19 (discussing the Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000)).

6. *Id.* at 29.

processes. The Note will also explore the extent to which the court's decision rewrote the formula defining the relationship between Missouri's agencies and its courts.

## II. FACTS AND HOLDING

The instant litigation arose from a challenge to the inclusion of the Mississippi and Missouri Rivers (collectively, "the Rivers") on Missouri's 1998 impaired waters list.<sup>7</sup> Public involvement with the development of Missouri's 1998 list began in January of that year, when the Missouri Department of Natural Resources ("MDNR")<sup>8</sup> issued a notice soliciting comments on the waterbodies it proposed to list as "impaired."<sup>9</sup> The Rivers were not among the 72 bodies of water proposed, prompting the Sierra Club to submit comments urging their inclusion.<sup>10</sup> In March, MDNR issued a second public notice, which included the Rivers and stated that the Sierra Club, not MDNR, recommended that they be included.<sup>11</sup> Two months later, MDNR issued a third public notice soliciting comments on the 85 bodies of water currently under consideration; however, the agency had removed the Rivers from the proposed list.<sup>12</sup> In its final notice of August, 1998, MDNR explained that the Rivers were not being considered for inclusion because they demonstrated no water contaminant violations.<sup>13</sup> The notice stated that MDNR looked "to the U.S. Congress to build upon existing efforts for the restoration of these great river resources," and announced that MDNR would hold a public hearing on the impaired waters list during the September 23, 1998 meeting of the Missouri Clean Water Commission ("the Commission").<sup>14</sup>

At the meeting, MDNR presented its final proposed list to the Commission and recommended that it be adopted and submitted for EPA approval.<sup>15</sup>

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7. *Id.* at 14; *see also infra* notes 67-72 and accompanying text (discussing the role of the impaired waters list in implementing the Clean Water Act ("CWA")).

8. MDNR and the Clean Water Commission are the two administrative agencies carrying out Missouri's responsibilities under the federal Clean Water Act. *Mo. Soybean Ass'n*, 102 S.W.3d at 19-20 (citing MO. REV. STAT. § 640.010.1 (2000)). MDNR develops the impaired waters list, but the Clean Water Commission is the body that formally adopts and submits it to the EPA. *Id.* MDNR is comprised of career agency experts, while the Clean Water Commission is comprised of part-time political appointees. *See infra* notes 160, 189-91 and accompanying text.

9. *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, No. WD59650, 2002 Mo. App. LEXIS 49, at \*9 (Mo. Ct. App. Jan. 15, 2002), *superseded by* 102 S.W.3d 10 (Mo. 2003) (en banc).

10. *Id.*

11. *Id.*

12. *Id.* at \*10-11.

13. *Id.* at \*11.

14. *Id.*

15. *Id.*

Although the Rivers were still not a part of MDNR's recommendations, "representatives of various organizations spoke for and against including the Rivers on the list."<sup>16</sup> Despite MDNR's reservations, the Commission's members abruptly voted to add the Rivers to the list at the close of the public hearing.<sup>17</sup> The Commission assigned the Rivers to the list's category of waters requiring further study to assess their impairment before total maximum daily load ("TMDL") standards could be developed.<sup>18</sup> The Commission submitted the list to the EPA, and the EPA partially approved and partially disapproved the list.<sup>19</sup> Specifically, the EPA refused to recognize Missouri's category divisions, and instead required Missouri to prepare TMDLs for *all* the listed waters, including the Rivers.<sup>20</sup> The Rivers are the largest bodies of water ever designated as impaired waters and will be the largest bodies for which TMDL standards have ever been developed.<sup>21</sup>

Several trade and business associations ("the Associations")<sup>22</sup> filed a petition challenging the list and seeking declaratory and injunctive relief under the Missouri Administrative Procedure Act ("MAPA").<sup>23</sup> The petition alleged that the list was a "rule," as defined by MAPA,<sup>24</sup> since it would have a "potential impact" on the Associations and their members.<sup>25</sup> The

16. *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 20 (Mo. 2003) (en banc). At the hearing, the Sierra Club requested that the Rivers be included on the list, while the Missouri Soybean Association requested that they not be included. *Mo. Soybean Ass'n*, 2002 Mo. App. LEXIS 49, at \*11-12.

17. *Mo. Soybean Ass'n*, 102 S.W.3d at 20.

18. *Id.* A TMDL standard identifies the amount of a particular pollutant that a body of water can readily assimilate without violating water quality standards. See e.g. *San Francisco Baykeeper, Inc. v. Browner*, 147 F. Supp. 2d 991, 995 (N.D. Cal. 2001) (citing 33 U.S.C. § 1313(d)(1)(C)).

19. *Mo. Soybean Ass'n*, 2002 Mo. App. LEXIS 49, at \*15.

20. *Id.*

21. *Id.* at \*15-16.

22. The Missouri Soybean Association, Missouri Agricultural Industries Council, Inc., Associated Industries of Missouri, and the Missouri Chamber of Commerce challenged the Commission's action. *Mo. Soybean Ass'n*, 102 S.W.3d at 14 n.1.

23. *Id.* at 14 (citing MO. REV. STAT. §§ 536.010-.215 (2000)).

24. *Id.* at 21. MAPA defines a "rule" as "each agency statement of general applicability that implements, interprets, or prescribes law or policy, . . . [subject to exceptions not relevant here]." *Id.* at 22 (quoting MO. REV. STAT. § 536.010(4) (2000)) (alteration in original).

25. *Id.* at 24. The Associations alleged a myriad of injuries as a result of the Rivers' inclusion such as:

changes in land-management practices, limits on the sales and use of fertilizers and pesticides, limits on crop growth and rotation, decreased crop yields, increased farming costs, limitations on production and/or manufacturing quantity and quality, changes in . . . point source effluent limitations, increased cost of water treatment, restrictions on locations for pro-

Associations asked the court to declare the list void and unenforceable as a rule promulgated in violation of the rulemaking procedures required by MAPA.<sup>26</sup>

The Circuit Court of Cole County dismissed with prejudice the Associations' petition, finding that "neither the Commission nor MDNR had rendered a final decision subject to judicial review."<sup>27</sup> The court reasoned that EPA approval of the list, rather than Missouri's development and submission of the list, could be the only final decision since the EPA was the final arbiter of what constitutes an "impaired water."<sup>28</sup> Accordingly, the court held that it lacked subject-matter jurisdiction as the EPA's approval of the list was beyond the purview of a state court.<sup>29</sup>

The Court of Appeals for the Western District of Missouri affirmed the circuit court's dismissal for lack of subject-matter jurisdiction on different grounds.<sup>30</sup> The appellate court held that the impaired waters list fell within the "intergovernmental communication" exception to the MAPA definition of a "rule" because it constituted communication between the MDNR and the EPA and did not substantially affect the rights of the public.<sup>31</sup> Because the court concluded that the list was not a rule, it dismissed the petition for lack of subject-matter jurisdiction.<sup>32</sup>

A five-judge majority of the Missouri Supreme Court affirmed the dismissal on alternate grounds, neither of which had been invoked by the trial or appellate courts.<sup>33</sup> The court held that the impaired waters list was not a rule

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duction and manufacturing, and limitations on raw materials that could be used in production or manufacturing.

*Id.* at 21.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* However, EPA approval was not beyond the purview of the federal courts. The Eighth Circuit Court of Appeals reviewed the EPA's approval of the list in *Missouri Soybean Ass'n v. United States EPA*, 289 F.3d 509 (8th Cir. 2002) (*per curiam*), holding that the Missouri Soybean Association's petition for review was unripe because its claims of harm were "too remote to be anything other than speculative" until TMDL's were developed and implemented. *Id.* at 513. The court dismissed the petition without prejudice for lack of subject-matter jurisdiction. *Id.*

30. *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, No. WD59650, 2002 Mo. App. LEXIS 49, at \*50-51 (Mo. Ct. App. Jan. 15, 2002), *superseded by* 102 S.W.3d 10 (Mo. 2003) (*en banc*).

31. *Id.* at \*44-48; MO. REV. STAT. § 536.010(4)(c)(2000) (exempting "[a]n intergovernmental, interagency, or intraagency memorandum, directive, manual or other communication which does not substantially affect the legal rights of . . . the public" from MAPA's definition of a "rule").

32. *Mo. Soybean Ass'n*, 2002 Mo. App. LEXIS 49, at \*51; *see also* MO. REV. STAT. § 536.050.1 (2000) (authorizing Missouri courts to render declaratory judgments as to a rule or its threatened application).

33. *Mo. Soybean Ass'n*, 102 S.W.3d at 14.

because the list did not have the “force of law” and did not have a potential impact on the rights of the Associations or their members.<sup>34</sup> The court also held that the controversy was not ripe for adjudication because the alleged harms were too remote and speculative.<sup>35</sup> Two judges dissented.<sup>36</sup>

### III. LEGAL BACKGROUND

#### A. Rulemaking

Informal “notice and comment” rulemaking procedures promote “fundamental fairness” in agency law-making by ensuring that proposed rules are legal, technically sound, and politically acceptable, all the while ensuring that the affected public has adequate notice of the proposed action.<sup>37</sup> MAPA’s notice and comment rulemaking procedures promote these objectives in a number of ways. Required agency findings and the threat of judicial review help ensure that the proposed rule is legal.<sup>38</sup> The notice of proposed rulemak-

34. *Id.* at 23-24.

35. *Id.* at 29. The court modified the circuit court’s dismissal with prejudice to a dismissal without prejudice. *Id.*

36. Chief Justice Limbaugh wrote a dissent in which Judge Benton concurred. *Id.* (Limbaugh, C.J., dissenting). The dissent argued that the impaired waters list was a rule because (1) it was “an agency action of ‘general applicability;’” (2) it was promulgated with the aim of prescribing and implementing state and federal environmental policy; and (3) it would have a potential impact on the rights of the Associations. *Id.* at 30-31 (Limbaugh, C.J., dissenting). The dissent would have held that the controversy was ripe for adjudication because MAPA confers standing to challenge an agency rule on “[a]ny person who is or *may be* aggrieved.” *Id.* at 31-32 (Limbaugh, C.J., dissenting) (quoting MO. REV. STAT. § 536.053 (2000)). Premised on the holding that the impaired waters list was a rule and the Associations had standing to challenge it, the dissent believed that the list was void since it was not promulgated in accordance with MAPA’s rulemaking procedures. *Id.* at 32-33 (Limbaugh, C.J., dissenting).

37. Fundamental fairness means that, at the very least, the rulemaking process advances the public interest. ARTHUR EARL BONFIELD, STATE ADMINISTRATIVE RULE MAKING § 5.3, at 150 (1986). A proposed rule is legal if it is within the bounds of the agency’s statutory authority. *Id.* § 5.2.1, at 144. A proposed rule is technically sound if the agency considers all relevant information and formulates a rule that most sensibly accomplishes the statutory directive. *Id.* § 5.2.2, at 145. A rule is usually politically acceptable if the public is afforded a reasonable opportunity to participate and influence the process. *Id.* § 5.2.3, at 146. The public has adequate notice if provided with enough information about the proposed rule in enough time to adjust to it before sanctions are imposed for noncompliance. *Id.* § 5.2.4, at 149.

38. See MO. REV. STAT. § 536.016 (2000) (requiring the agency to find that the proposed rule is “necessary” to carry out the purposes of the agency’s authorizing statute); see also *id.* § 536.014 (rendering invalid a rule promulgated in the absence of statutory authority, a rule in conflict with state law, or a rule that is arbitrary, capricious, or “unreasonably burdensome on persons affected”).

ing and final order of rulemaking ensure that the public has adequate notice of the rulemaking process.<sup>39</sup> The comments solicited by the notice and the agency's consideration of those comments ensure that the proposed rule is the result of reasoned decision making based on all relevant information, thereby ensuring that the rule is technically sound.<sup>40</sup> Public comment also ensures that a proposed rule is politically acceptable because the input of interested persons requires an agency to assess the full range of interests affected by a proposed rule.<sup>41</sup> By encouraging participation by interested persons, the agency gains the legitimacy it needs to ensure compliance with the rule once it is promulgated, and, in doing so, fosters compliance with the overall regulatory scheme.<sup>42</sup>

Procedures outside MAPA's informal rulemaking procedures also ensure fundamental fairness in agency action. The legislative veto, review by the General Assembly's joint committee on rules, and the fiscal note requirement also ensure that a proposed rule is politically acceptable.<sup>43</sup> The authoriz-

39. *Id.* § 536.021.1-.2 (requiring a notice of proposed rulemaking). "The notice of proposed rulemaking provides notice to affected parties 'to allow opportunity for comment by supporters or opponents of the measure, and so to induce a modification.'" *Covera Abatement Techs., Inc. v. Air Conservation Comm'n*, 973 S.W.2d 851, 854 (Mo. 1998) (en banc) (quoting *Mo. Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380, 391 (Mo. Ct. App. 1994)). See also MO. REV. STAT. § 536.021.5-.6 (requiring the agency to provide a final order of rulemaking). In addition to the notice of proposed rulemaking and the final order of rulemaking, the agency may also keep a "public rulemaking docket" to keep the public informed of the agency's rulemaking efforts. *Id.* § 536.046.

40. See MO. REV. STAT. § 536.021.5; see also *id.* § 536.021.6(4) (requiring that the final order of rulemaking summarize comments and present findings with respect to the comments). Although agencies are repositories of technical expertise, the public comments often fill in gaps in the agencies' knowledge regarding the day-to-day work of the regulated private sector. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* (2d ed. 2001) § 2.1, at 42. Also, since much agency rulemaking takes place in highly technical areas such as environmental regulation where agencies often operate on the leading edge of science, courts insist that agencies subject their own technical information to scrutiny by the wider scientific community. *Id.* (quoting *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 652 (D.C. Cir. 1973)).

41. See generally Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

42. "Charting changes in policy direction with the aid of those who will be affected by the shift in course helps dispel suspicions of agency predisposition, unfairness, arrogance, improper influence, and ulterior motivation." *Chamber of Commerce v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980).

43. MO. REV. STAT. § 536.021.1 (legislative veto); *Id.* § 536.024 (requiring state agencies to submit proposed rules to the Joint Committee on Administrative Rules of the Missouri General Assembly); *Id.* § 536.200-.215 (requiring a state agency to file a fiscal note with the Secretary of State when the rule includes a material economic impact on public and private expenditures, public revenues, and private incomes); see also Alfred S. Neely, *Song in a Crabbed Key in Missouri, Circa 1994: The Judi-*

ing statute of a regulatory scheme or regulatory agency also frequently imposes further procedural requirements designed to ensure public participation and political acceptability.<sup>44</sup>

In light of the important objectives rulemaking procedures seek to promote, it is not surprising that an agency's failure to follow MAPA's rulemaking procedures will render a rule "null, void, and unenforceable."<sup>45</sup> The specificity of the required procedures and the severity of this sanction for noncompliance demonstrate a policy judgment that MAPA's rulemaking procedures are not merely legal technicalities hindering agency efficiency; rather, they are essential to fundamentally fair rulemaking.<sup>46</sup> Missouri courts have honored this policy judgment by requiring strict compliance with MAPA and have often voided rules even when an agency has substantially complied with the required procedures.<sup>47</sup> Missouri courts have reasoned that an agency's failure to engage in the applicable rulemaking procedures "undermines the integrity" of the rulemaking process, thereby eroding the fundamental fairness these procedures seek to ensure.<sup>48</sup>

### B. Rules

While MAPA specifically defines the procedures by which an agency must promulgate rules, it is less clear in defining what types of agency actions are "rules" requiring those procedures. Cutting through the "considerable smog" shrouding the distinction between rules and other agency statements of policy can be difficult because the practical effects of each are often the same—most people will comply with the policy statement in anticipation of future binding rules, rather than mounting a costly, time-consuming, and often futile challenge to the policy statement itself.<sup>49</sup> The line between a bind-

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*cial/Legislative Partnership in Administrative Law*, 21 J. LEGIS. 275, 290 (1995) (stating that "[t]he fiscal note does for economic consequences what the environmental impact statement does for environmental effects").

44. See, e.g., MO. REV. STAT. § 644.026(8) (2000) (Missouri Clean Water Law requiring notice and hearing when the Commission promulgates rules implementing the federal Clean Water Act); see also *infra* notes 67-72 and accompanying text (discussing procedural requirements of the federal Clean Water Act).

45. MO. REV. STAT. § 536.021.7.

46. *NME Hosps., Inc. v. Dep't of Soc. Servs.*, 850 S.W.2d 71, 74 (Mo. 1993) (en banc).

47. *Id.*; see also, *Kan. Ass'n of Private Investigators v. Mulvihill*, 35 S.W.3d 425, 430 (Mo. Ct. App. 2000); *Tonnar v. Mo. State Highway & Transp. Comm'n*, 640 S.W.2d 527, 532 (Mo. Ct. App. 1982).

48. *NME Hosps.*, 850 S.W.2d at 74. (quoting *St. Louis Christian Home v. Mo. Comm'n on Human Rights*, 634 S.W.2d 508, 515 (Mo. Ct. App. 1982)).

49. *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L. J. 381, 385 (1985).



ing rule and a nonbinding policy statement can be especially difficult to draw in the context of a regulatory scheme involving “cooperative federalism” where state and federal agencies take a series of interdependent and contingent actions in its planning and implementation.<sup>50</sup> In a cooperative federalism context, agencies issue numerous policy statements during the planning stages that may not have a binding effect, but serve as precursors upon which the agency will base binding rules in the future.<sup>51</sup> Notwithstanding the difficulty, delineating the distinction between a binding rule and an agency policy statement is critical because the distinction determines what procedures the agency must follow in promulgating the statement, whether the statement is binding on the agency and the public, and whether judicial review is available.<sup>52</sup>

Although a firm consensus has yet to develop regarding where to draw the line between a rule and an agency policy statement, any attempt to do so begins with the statutory definition of a “rule.”<sup>53</sup> However, MAPA’s definition of a “rule” is of little assistance because it is “broad enough to encompass virtually any statement an agency might make in any context.”<sup>54</sup> Under

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50. See, e.g., *New York v. United States*, 505 U.S. 144, 167-68 (1992) (collecting examples of “cooperative federalism”).

51. Amanda C. Cohen, Note, *Ripeness Revisited: The Implications of Ohio Forestry Association, Inc. v. Sierra Club for Environmental Litigation*, 23 HARV. ENVTL. L. REV. 547, 554-55 (1999) (discussing the “bureaucratic steamroller” effect of agency policy statements).

52. Agencies must engage in rulemaking procedures to promulgate rules, but need not do so in order to issue policy statements. 1 DAVIS & PIERCE, *supra* note 3, § 6.2, at 228-30 (discussing *Pac. Gas & Elec. v. Fed. Power Comm’n*, 506 F.2d 33 (D.C. Cir. 1974)). Both the agency and the public are bound by rules, whereas policy statements are usually nonbinding. *Id.* at 228. Courts will review challenges to rules, but are reluctant to review challenges to policy statements. *Id.*

53. AMAN & MAYTON, *supra* note 40, § 4.1, at 75; MO. REV. STAT. § 536.010(4) (2000) (defining a “rule” as “each agency statement of general applicability that implements, interprets, or prescribes law or policy, . . . [including] the amendment or repeal of an existing rule . . . [subject to certain exceptions]”). Exceptions to MAPA’s definition of a “rule” include, *inter alia*, (a) statements regarding internal management of an agency not substantially affecting the public; (b) interpretations or judgments interpreting a specific set of facts; (c) intergovernmental communication not substantially affecting the public or any segment thereof; (d) determinations, decisions, or orders; (e) attorney general opinions; and (f) staff guidelines. *Id.* § 536.010(4)(a)-(f).

54. 1 DAVIS & PIERCE, *supra* note 3, § 6.1, at 226 (discussing the federal Administrative Procedure Act (“APA”) definition of a “rule”). The federal APA’s definition of a “rule” is equally unhelpful. Like MAPA, the APA defines a “rule” as “the whole or a part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4) (2000); MO. REV. STAT. § 536.010(4). However, the APA’s definition of a “rule” differs from the MAPA definition because the APA specifically exempts “general statements of policy.” 5 U.S.C. § 553(b)(3)(A) (2000). Unlike the APA, the MAPA neither defines nor exempts agency policy statements.

a literal reading of the definition, most agency policy statements would fall within the definition of a “rule” because most agency policy statements are of “general applicability” and implement, interpret, or prescribe law or policy.<sup>55</sup>

Missouri courts have rejected this literal reading, however, holding instead that not every generally applicable statement of agency policy is a “rule.”<sup>56</sup> Where possible, courts have exempted policy statements by fitting them into one of MAPA’s thirteen specific exceptions to the definition of a “rule.”<sup>57</sup> But even in cases where none of the express exceptions applied, Missouri courts have still held that a particular agency policy statement was not a rule because it would not have a “potential impact” on the public.<sup>58</sup> This “potential impact” criterion is similar to, but broader than, the “substantial impact” qualifying language in MAPA’s “intergovernmental communication” and “internal management” exemptions.<sup>59</sup> Because the potential impact criterion is broader than the substantial impact qualifying language, it appears that a court would be more likely to exempt an agency statement having *some* impact that fell within the enumerated exemptions, than it would to exempt a

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55. See *BONFIELD*, *supra* note 37, § 3.3.4, at 90-91 (arguing that the inclusion of the term “policy” in addition to the term “law” in the 1961 Model State Administrative Procedure Act’s (“MSAPA”) definition of a rule was intended to ensure that agencies could not circumvent the applicable rulemaking procedures by describing the statement as merely “policy” not having the effect of “law”). The MAPA’s definition of a rule is based on the 1961 MSAPA’s definition. *Id.* § 3.3.1, at 73-74, 74 n.2; see also MODEL STATE ADMIN. PROCEDURE ACT §1(7) (1961).

56. *E.g.*, *Baugus v. Dir. of Revenue*, 878 S.W.2d 39, 42 (Mo. 1994) (en banc).

57. *See, e.g.*, *McCallister v. Priest*, 422 S.W.2d 650, 659 (Mo. 1968) (en banc) (construing the “internal management” exemption in MO. REV. STAT. § 536.010(4)(a) (1957) to exempt a police department policy manual containing personnel termination procedures); see also *Kent County Aeronautics Bd. v. Dep’t of State Police*, 609 N.W.2d 593, 603-04 (Mich. Ct. App. 2000) (construing MICH. COMP. LAWS § 24.207(g) (2000) which exempts from the state’s administrative procedure act’s definition of a “rule” an “intergovernmental, interagency, or intra-agency . . . communication that does not affect the rights of . . . the public”), *aff’d sub nom.*, *Byrne v. State*, 624 N.W.2d 906 (Mich. 2001). Missouri Revised Statute Section 536.010(4)(c) (2000) provides the same exemption for such communications, and the appellate court in the instant litigation relied on *Kent County Aeronautics Board*, a Michigan case, to hold that an impaired waters list fell within MAPA’s “intergovernmental communication” exemption. *Mo. Soybean Ass’n v. Mo. Clean Water Comm’n*, No. WD59650, 2002 Mo. App. LEXIS 49, at \*39-45 (Mo. Ct. App. Jan. 15, 2002), *superseded by* 102 S.W.3d 10 (Mo. 2003) (en banc).

58. *See, e.g.*, *Baugus*, 878 S.W.2d at 42 (holding that for an agency policy statement to be considered a rule the statement must have “a potential, however slight, of impacting the substantive or procedural rights of some member of the public”).

59. The “intergovernmental communication” and “internal management” exemptions apply only if these types of agency statements do not “substantially affect the legal rights of, or procedures available to, the public.” MO. REV. STAT. § 536.010(4)(a), (c).

statement that could not be fit into any exemptions.<sup>60</sup> Thus if an agency statement has even “a potential, however slight” of impacting the rights of the public and does not fall within MAPA’s exemptions, it is still probably a “rule.”<sup>61</sup>

### *C. Rulemaking and the Clean Water Act*

As discussed previously, the distinction between an agency policy statement and a rule can be especially difficult to draw in the context of regulatory schemes involving “cooperative federalism.”<sup>62</sup> Such schemes regulate housing, social security, education, environmental protection, conservation, health care, food stamps, unemployment compensation, and a myriad of other areas of human conduct.<sup>63</sup> State and federal agencies take a variety of contingent and interdependent steps to implement these lengthy, complex, and often highly technical regulatory schemes.<sup>64</sup> The interdependence inherent in these schemes of “cooperative federalism” makes it difficult not only to distinguish between rules and other policy statements, but also to determine whether it is the state or federal agency that is the one making the purported rule. The distinction is also difficult to make in this context because the regulatory framework itself often requires procedures substantially similar to the notice and comment rulemaking procedures required by state and federal administrative procedure acts. This makes it difficult for both courts and the

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60. *Compare Baugus*, 878 S.W.2d at 42 (holding that the Director of Revenue’s decision to include the word “prior” before the word “salvage” on automobile title was not a rule because it did not have a potential impact on anyone’s rights), with *Tonnar v. Mo. State Highway & Transp. Comm’n*, 640 S.W.2d 527, 531 (Mo. Ct. App. 1982) (holding that a “Right of Way Manual” prepared by the Missouri Highway and Transportation Commission as required by the federal Department of Transportation in order to receive federal highway funding was a rule because it “declare[d] the policy of the [Missouri Highway and Transportation] Commission in respect to . . . compensation and relocation payments and . . . set practices and procedures governing rights of the public in these areas,” which the court reasoned would have a substantial impact on the rights of the public).

61. *Baugus*, 878 S.W.2d at 42; *see also* *NME Hosps., Inc. v. Dep’t of Soc. Servs.*, 850 S.W.2d 71, 73-75 (Mo. 1993) (en banc) (holding that a change in the Missouri Department of Social Services’ policy governing Medicaid reimbursement for psychiatric services was a rule because it changed statewide policy and impacted the rights of Medicaid recipients); *Mo. State Div. of Family Servs. v. Barclay*, 705 S.W.2d 518, 521 (Mo. Ct. App. 1985) (holding that the method to determine a Medicaid recipient’s allocation of income was a rule because it “substantially affects” the legal rights of Medicaid recipients).

62. *See supra* notes 49-51 and accompanying text.

63. *Anthony, supra* note 2, at 1365; *see also* *New York v. United States*, 505 U.S. 144, 167-68 (1992).

64. *See, e.g.,* *Mo. Soybean Ass’n v. Mo. Clean Water Comm’n*, 102 S.W.3d 10, 15-19 (Mo. 2003) (en banc) (discussing the Clean Water Act).

public to know whether the agency statement at issue can be challenged as a rule and, if so, in which court such a challenge can be brought.

The Clean Water Act ("CWA") is one such example of "cooperative federalism."<sup>65</sup> The CWA establishes a cooperative effort between state and federal governments "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>66</sup> As part of this cooperative effort, a state's environmental agency is required to establish water quality standards for each body of water within its borders.<sup>67</sup> The state agency is also required to compile a list of waters that do not meet and are not expected to meet those water quality standards despite the use of technical pollution controls.<sup>68</sup> After compiling this "impaired waters" list, the state environmental agency must submit it to the EPA for approval.<sup>69</sup>

EPA approval triggers the state's responsibility to develop and implement "total maximum daily load" ("TMDL") standards for each of the listed bodies of water, representing the maximum amount of a given pollutant that can be discharged into a listed body of water.<sup>70</sup> Because TMDL development is a technically complex and time consuming process, many years often elapse between the time a waterbody is listed and the time TMDLs will be applied to it; however, once a state develops TMDLs and the EPA approves them, the CWA requires the state to take measures to ensure that the listed waters comply.<sup>71</sup> The state may take a number of actions to ensure compliance including restricting land use or mandating certain land management practices.<sup>72</sup>

65. 33 U.S.C. §§ 1251-1387 (2000).

66. *Id.* § 1251. "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." *Id.* § 1251(g).

67. *Mo. Soybean Ass'n*, 102 S.W.3d at 16 (citing 33 U.S.C. § 1313(a)-(c) (2000)).

68. 33 U.S.C. § 1313(d)(1). "[I]f [technical pollution controls] alone can 'bring a waterway into compliance with standards, well and good. If not, then [33 U.S.C. § 1313(d)(1)] require[s] the waterway to join a list of unfinished business.'" *Mo. Soybean Ass'n*, 102 S.W.3d at 17 (quoting *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1343 (N.D. Cal. 2000), *aff'd*, 291 F.3d 1123 (9th Cir. 2002)) (alteration in original).

69. 33 U.S.C. § 1313(d)(2). A state's impaired waters list is commonly referred to as a "303(d) list." See *Mo. Soybean Ass'n*, 102 S.W.3d at 17.

70. *Mo. Soybean Ass'n*, 102 S.W.3d at 17 (citing 33 U.S.C. § 1313(d)(1)(C)). See also EPA, National TMDL Tracking System (NTTS), available at <http://www.epa.gov/owow/tmdl/> (last visited June 19, 2004). The NTTS contains "State-specific data on approved [impaired waters] lists and approved TMDLs as well as a national summary of impaired waters and TMDLs that have been approved for [those] waters." 68 Fed. Reg. 13,608, 13,611 (March 19, 2003).

71. *Mo. Soybean Ass'n*, 102 S.W.3d at 18-19.

72. *Id.* at 19. For further discussion of TMDL standards and the ongoing effort to regulate non-point source pollution, see Mary E. Christopher, Note, *Time to Bite the Bullet: A Look at State Implementation of Total Maximum Daily Loads (TMDLs)*

Due to the volume and variety of actions taken by state and federal agencies to implement the lengthy, highly technical, and interdependent TMDL program, courts have struggled to determine which agency actions are rules and which are merely statements of agency policy. Land use regulations imposed to implement the TMDL standards are clearly rules requiring promulgation pursuant to MAPA's rulemaking procedures, since such generally applicable regulations implement the water pollution control policy embodied by the impaired waters list and the TMDL standards and have a "potential impact" on the public by requiring changes in primary conduct.<sup>73</sup> However, the water is muddy as to whether actions taken earlier in the process, such as compiling the impaired waters list or establishing the TMDLs, are rules or merely policy statements.<sup>74</sup> Both the impaired waters list and the TMDLs are generally applicable and prescribe the state's policy with respect to how it will implement the CWA, but their "potential impact" on the public is unclear.<sup>75</sup> The question is at what point in the implementation of the cooperative regulatory framework of the CWA is the potential impact on the public sufficient to transform a particular policy statement into a binding rule.

The CWA and the Missouri Clean Water Law further complicate this question by requiring procedures similar to the rulemaking procedures required by MAPA. Like MAPA, federal regulations implementing the CWA require notice and public comment on a proposed impaired waters list.<sup>76</sup> The Missouri Clean Water Law likewise requires the Commission to provide notice and opportunity for comment whenever it acts with respect to the CWA.<sup>77</sup> The similarities between the procedures required by the Missouri

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*Under Section 303(D) of the Clean Water Act*, 40 WASHBURN L.J. 480 (2001). For a discussion of resistance to the TMDL program, see generally David Zaring, Note, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 HARV. ENVTL. L. REV. 515 (1996).

73. *Sierra Club v. United States EPA*, 162 F. Supp. 2d 406, 419-20 (D. Md. 2001) (stating that a state engages in rulemaking when it develops TMDL standards). "[I]f the State did, after due study, propose regulations impacting the [Associations], they would enjoy the full panoply of rights guaranteed . . . to those that choose to contest such regulations." *Mo. Soybean Ass'n*, 102 S.W.3d at 24.

74. See *supra* Part III.B.

75. See *supra* notes 58-61 and accompanying text.

76. See, e.g., 40 C.F.R. § 130.10(d)(10)(iv) (2003) (discussing notice requirements of the CWA); see also *id.* § 25.3(c)(4) (stating that it is the objective of EPA and state agencies "[t]o encourage public involvement in implementing environmental laws").

77. The Missouri Clean Water Law provides that the Commission shall "[a]dopt [or] promulgate . . . after due notice and hearing, rules and regulations to enforce, implement, and effectuate the powers and duties . . . required of this state by any federal water pollution control act." MO. REV. STAT. § 644.026(8) (2000). The Court of Appeals for the Western District of Missouri in *Missouri Soybean Association* rejected the Associations' argument that this provision requires the Commission to act by rule whenever it acts in relation to the CWA. *Mo. Soybean Ass'n v. Mo. Clean*

Clean Water Law, the CWA, and MAPA may give the affected public the impression that actions implementing the Missouri Clean Water Law and the CWA are rules subject to judicial review.

Even if the courts and the public can correctly distinguish a policy statement from a rule, complicated regulatory frameworks like the CWA compound the confusion by making it difficult to determine whether it is the state or federal agency who is promulgating the purported rule. Identifying the rulemaker matters not just for venue and jurisdiction purposes, but also for determining what procedures are required.<sup>78</sup> The inconsistency between the lower court decisions in the instant litigation and federal court decisions reviewing challenges to EPA approval of impaired waters lists illustrates this difficulty.<sup>79</sup> In the instant litigation the trial court held that neither MDNR nor the Commission had rendered a final decision by simply submitting the impaired waters list to the EPA.<sup>80</sup> Since the EPA is the final arbiter of the list's contents, the court reasoned that it was the EPA, and not the state, who engaged in rulemaking by approving the list.<sup>81</sup>

This decision was inconsistent with a number of federal court decisions holding that it is the state, and not the EPA, that engages in rulemaking by developing and submitting its impaired waters list.<sup>82</sup> In *Sierra Club v. United States EPA*,<sup>83</sup> the U.S. District Court for the District of Maryland held that the EPA's approval of Maryland's 1996 impaired waters list was not rulemaking; rather only the state's development of the list or the TMDL standards could be considered rulemaking.<sup>84</sup> Likewise, the Tenth Circuit stated that "it is the states . . . which conduct rulemaking proceedings" under the CWA, with the EPA merely sitting in a reviewing capacity.<sup>85</sup> However, the federal courts

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Water Comm'n, No. WD59650, 2002 Mo. App. LEXIS 49, at \*26-29 (Mo. Ct. App. Jan. 15, 2002), *superseded by* 102 S.W.3d 10 (Mo. 2003) (en banc). The Missouri Supreme Court likewise rejected this argument on the ground that it was not preserved for review since it was raised for the first time on appeal. *Mo. Soybean Ass'n*, 102 S.W.3d at 25 n.21.

78. *See, e.g.*, 33 U.S.C. 1369(b) (2000). As a federal agency, the EPA must promulgate rules in accordance with the APA. 5 U.S.C. § 552(a) (2000). Missouri state agencies are subject to MAPA. MO. REV. STAT. § 536.016 (2000).

79. *See Mo. Soybean Ass'n*, 102 S.W.3d at 21.

80. *Id.*

81. *Id.* As a result, the trial court dismissed the challenge because it was without jurisdiction to review the actions of a federal agency. *Id.*

82. *See, e.g.*, *Sierra Club v. United States EPA*, 162 F. Supp. 2d 406, 419-20 (D. Md. 2001).

83. 162 F. Supp. 2d 406 (D. Md. 2001).

84. *Id.* at 419-20 (citing *Am. Canoe Ass'n v. United States EPA*, 54 F. Supp. 2d 621, 629 (E.D. Va. 1999)).

85. *City of Albuquerque v. Browner*, 97 F.3d 415, 424-25 (10th Cir. 1996) (citing *Natural Res. Def. Council v. United States EPA*, 16 F.3d 1395, 1399, 1401 (4th Cir.1993) for the proposition that states have the primary role under 33 U.S.C. § 1313

have not unanimously endorsed this position, with one intimating that aggrieved landowners could challenge EPA approval of an impaired waters list under the federal APA.<sup>86</sup>

The Eighth Circuit Court of Appeals has not squarely decided the issue and refrained from doing so when presented with the Association's federal court challenge to the EPA's approval of Missouri's 1998 list.<sup>87</sup> Instead, the Eighth Circuit dismissed the challenge because the Associations failed to show that the EPA's approval of the list affected them or their members in a concrete enough way as to make their claim ripe for adjudication.<sup>88</sup> Although the court did not address the merits of the challenge, the ripeness holding implies that the Eighth Circuit viewed the EPA, and not the state, as the rule-maker.<sup>89</sup>

The appellate court decision in the instant litigation implied precisely the opposite, however, by holding that the impaired waters list fell within the "intergovernmental communication" exemption to MAPA's definition of a "rule."<sup>90</sup> Relying on a Michigan appellate court's interpretation of the Michigan Administrative Procedure Act, the Missouri appellate court held that the state's development and submission of the impaired waters list constituted little more than a discussion between the state and the EPA, which did not substantially affect the rights of the public "because the placement of [waterbodies] on the list merely triggers the State's obligation to establish a TMDL for that particular waterbody."<sup>91</sup> The court justified its reliance on the Michigan case by noting the paucity of state court challenges to a state's development and submission of an impaired waters list and the paucity of cases construing MAPA's "intergovernmental communication" exemption.<sup>92</sup> Unlike the trial court decision in the instant litigation, the appellate court decision is consistent with federal court decisions holding that it is the state, and not the

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of the CWA, and EPA's sole function is to review and approve or reject the state's standards).

86. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1355 (N.D. Cal. 2000), *aff'd*, 291 F.3d 1123 (9th Cir. 2002) (citing 5 U.S.C. §§ 702, 706 (2000)).

87. *Mo. Soybean Ass'n v. United States EPA*, 289 F.3d 509, 511 (8th Cir. 2002) (per curiam). Following the appellate court's dismissal of their state court challenge, the Missouri Soybean Association and others challenged EPA approval of the list in federal court. See *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, No. WD59650, 2002 Mo. App. LEXIS 49 (Mo. Ct. App. Jan. 15, 2002), *superseded by* 102 S.W.3d 10 (Mo. 2003)(en banc).

88. *Mo. Soybean Ass'n*, 289 F.3d at 512-513.

89. *Id.* at 513.

90. *Mo. Soybean Ass'n*, 2002 Mo. App. LEXIS 49, at \*51 (citing MO. REV. STAT. § 536.010(4)(c) (2000)).

91. *Id.* at \*40-45 (discussing *Kent County Aeronautics Bd. v. Dep't of State Police*, 609 N.W.2d 593 (Mich. Ct. App. 2000), *aff'd*, 624 N.W.2d 906 (Mich. 2001)); see also MO. REV. STAT. § 536.010(4)(c) (2000) (exempting intergovernmental communications not substantially affecting the public).

92. *Mo. Soybean Ass'n*, 2002 Mo. App. LEXIS 49, at \*32-45.

EPA, that makes rules when developing and submitting impaired waters lists.<sup>93</sup>

In response to the appellate court decision, the Missouri General Assembly attempted to clarify the muddy waters of judicial review of impaired waters lists by amending the Missouri Clean Water Law to expressly require that all future lists be adopted pursuant to MAPA.<sup>94</sup> This amendment aligned Missouri law with the federal court cases holding that the state is the relevant rulemaker and that the impaired waters list is its rule.<sup>95</sup> Although the amendment clarifies and harmonizes Missouri law, it may have the “potential impact” of frustrating state implementation of the CWA.<sup>96</sup>

#### *D. Ripeness and Rule Challenges*

As discussed previously, drawing the distinction between a rule and an agency policy statement is critical in determining whether a court is authorized to review the agency action taken.<sup>97</sup> However, just because a court *can* review an agency rule does not mean that it *must*. Even if an agency statement meets MAPA’s definition of a rule and has a “potential impact” on the public, a court may still refuse to review the agency statement by holding the challenge not ripe for review.

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93. See *supra* notes 82-85 and accompanying text.

94. The Missouri Clean Water Law now provides that

[a]ny listing required by Section 303(d) of the federal Clean Water Act, as amended, 33 U.S.C. 1251 *et seq.*, to be sent to the U.S. Environmental Protection Agency for their approval that will result in any waters of this state being classified as impaired shall be adopted by rule pursuant to [the MAPA]. Total maximum daily loads shall not be required for any listed waters that subsequently are determined to meet water quality standards.

Act of July 11, 2002, No. 984, § A, 983, 986 (codified as amended at MO. REV. STAT. § 644.036.5 (Supp. 2003)); see also *Mo. Soybean Ass’n v. Mo. Clean Water Comm’n*, 102 S.W.3d 10, 25 n.23, 32 n.1 (Limbaugh, C.J., dissenting).

95. See *supra* notes 82-85 and accompanying text.

96. Ken Midkiff, Clean Water Director of the Sierra Club, stated:

Water quality employees of the [MDNR] have on three occasions stated that, given the [new] requirements of Missouri law, it will be ‘impossible’ to meet the federal Clean Water Act requirement that the list of impaired waters be submitted to the US EPA by April 1, 2004 . . . . The reasons for this ‘impossibility’ are simple: Missouri legislators passed a bill requiring the 303(d) list be prepared by the . . . Commission as an act of ‘administrative rulemaking.’

Press Release, Ozark Chapter of the Sierra Club, Sierra Club Ask EPA to Take over 303d List in Missouri (Aug. 18, 2003), available at [http://missouri.sierraclub.org/PressReleases/303d\\_list.htm](http://missouri.sierraclub.org/PressReleases/303d_list.htm).

97. See *supra* note 52 and accompanying text; see also MO. REV. STAT. § 536.050.1 (2000) (authorizing Missouri courts to render declaratory judgments as to the validity of a *rule* or the threatened application of a *rule*).



In administrative law, ripeness serves two basic purposes: "it conserves judicial resources for problems that are real and . . . imminent, by prohibiting their expenditure on . . . abstract, hypothetical, or remote" claims of harm, and "it limits the ability of courts to intrude . . . on the policymaking domain[] of the [agency]."<sup>98</sup> Ripeness issues frequently arise in the context of judicial review of rules because such challenges often seek a pre-enforcement declaratory judgment.<sup>99</sup> MAPA explicitly authorizes such pre-enforcement review by empowering courts to issue declaratory judgments about the validity of a rule or its threatened application.<sup>100</sup> However, because the power to render declaratory judgments is limited to ripe controversies, a court may refrain from rendering a declaratory judgment if it deems the alleged harm caused by the rule or its threatened application so remote and speculative as to make it unripe.<sup>101</sup>

Courts frequently deem a challenger's claim too remote or speculative when the court is asked to review an informal agency action such as a statement of agency policy or an announcement of future intent.<sup>102</sup> This is so because although the policy statement may cause significant indirect harm to members of the public, a court may be wary of reviewing the statement for the same reasons a court will be reluctant to determine that the agency statement is a rule—namely, that the statement is not sufficiently "binding" or that the potential impact of the statement is too remote, contingent, or speculative.<sup>103</sup> Thus, the determination of whether an agency policy statement is ripe for review can determine whether the agency statement is a rule and *vice versa*.<sup>104</sup> But whether decided on the basis that the policy statement is not ripe for review or that the policy statement is not a rule, the outcome is the same—the court will dismiss the challenge.<sup>105</sup>

98. See 2 DAVIS & PIERCE, *supra* note 3, §15.12, at 360; see also *Abbott Labs., Inc. v. Gardner*, 387 U.S. 136, 148-49 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977).

99. See 2 DAVIS & PIERCE, *supra* note 3, § 15.14, at 371 (discussing ripeness in the context of pre-enforcement challenges to rules).

100. MO. REV. STAT. § 536.050.1 (emphasis added).

101. *Mo. Health Care Ass'n v. Attorney Gen.*, 953 S.W.2d 617, 620 (Mo. 1997) (en banc); see also *AMAN & MAYTON*, *supra* note 40, § 12.9, at 413-14.

102. 2 DAVIS & PIERCE, *supra* note 3, §15.12, at 361.

103. *Id.* §15.15, at 384. In the context of the review of agency policy statements there is also a persistent question as to whether there is a final agency action subject to review. See *id.* §15.17, at 395-97 (discussing the relationship between ripeness and finality). In the instant decision there was no question but that the submission of the impaired waters list was a final action, as the state had nothing more to do. See generally *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10 (Mo. 2003) (en banc).

104. DAVIS & PIERCE, *supra* note 3, § 6.2, at 231. If a policy statement is found not to be a rule, a court will often be more likely to hold that the agency's statement is not "ripe" for judicial review. *Id.*

105. *Mo. Soybean Ass'n*, 102 S.W.3d at 22-27.

To determine the ripeness of a pre-enforcement challenge to an agency action, Missouri courts employ a variation of the two-part test articulated by the United States Supreme Court in *Abbott Laboratories, Inc. v. Gardner*,<sup>106</sup> evaluating the fitness of the issues tendered for judicial resolution and the hardship to the parties if judicial relief is denied.<sup>107</sup> Despite the “presumption of reviewability” that attaches to agency action, a court will be reluctant to provide review if both prongs of *Abbott Laboratories* are satisfied.<sup>108</sup>

Since ripeness is a constitutional limitation in only the most extreme cases,<sup>109</sup> courts have wide discretion in applying it when an agency action may not be sufficiently binding or clear enough in scope to be susceptible to a judicial resolution.<sup>110</sup> The court’s discretion is somewhat constrained, however, by a clear indication of the legislature’s intent that courts hear challenges to a particular agency action.<sup>111</sup> By conferring standing to challenge an agency rule on “any person who is or may be aggrieved,” MAPA’s standing provision may give a clear indication that the General Assembly intends that courts review agency actions even before a person is actually aggrieved.<sup>112</sup> Consequently, even though the doctrine of ripeness would counsel against review of such an action, MAPA’s standing provision suggests that Missouri courts should apply the ripeness doctrine sparingly in this context.

#### IV. INSTANT DECISION

In addressing the Associations’ challenge, the court first noted the appropriate standard of review of a dismissal for lack of subject-matter jurisdiction.<sup>113</sup> With the facts uncontested, the court reviewed the question of subject-matter jurisdiction *de novo*, with reference to the jurisdiction conferred by

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106. 387 U.S. 136, 149 (1967), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977).

107. *See, e.g., State ex rel. Kan. Power & Light v. Pub. Serv. Comm’n*, 770 S.W.2d 740, 742 (Mo. Ct. App. 1989) (stating that Missouri ripeness doctrine is much the same as that in *Abbott Laboratories*); *see also* Ports Petroleum Co. of Ohio v. Nixon, 37 S.W.3d 237, 241 (Mo. 2001) (en banc); *Mo. Health Care Ass’n v. Attorney Gen.*, 953 S.W.2d 617, 621 (Mo. 1997) (en banc); *Buechner v. Bond*, 650 S.W.2d 611, 614 (Mo. 1983) (en banc).

108. *Abbott Labs*, 387 U.S. at 148-49.

109. *See Tigor Title Ins. Co. v. F.T.C.*, 814 F.2d 731, 746 n.1 (D.C. Cir. 1987) (Williams, J., concurring).

110. 2 DAVIS & PIERCE, *supra* note 3, § 15.12, at 360-61.

111. 3 *id.* § 16.7, at 49. This intent is often demonstrated by an administrative procedure act’s standing provision, since the doctrines of ripeness and standing are closely intertwined. *See Mo. Health Care Ass’n*, 953 S.W.2d at 620.

112. MO. REV. STAT. § 536.053 (2000).

113. *Mo. Soybean Ass’n v. Mo. Clean Water Comm’n*, 102 S.W.3d 10, 21-22 (Mo. 2003) (en banc).

MAPA's declaratory judgment provision pursuant to which the Associations brought the challenge.<sup>114</sup> Because the power to render declaratory judgments extends to challenging the validity of a "rule," the court faced the threshold question of whether the impaired waters list was a "rule."<sup>115</sup> The court answered this question in the negative, relying primarily on MAPA's definition of a "rule" and the court's own "potential impact" criterion.<sup>116</sup>

First, the court read MAPA's requirement that the agency statement be of "general applicability" to imply "that something . . . will be *applied* to [an] unnamed, unspecified group of people."<sup>117</sup> The court reasoned that the impaired waters list could not be of "general applicability" because it would not, and could not, be applied to the Associations or their members, as it merely identified certain waters as impaired.<sup>118</sup> The impaired waters list could not have the "force of law" because it did not establish a "code of conduct" binding the Associations or their members.<sup>119</sup>

The court also concluded that the list was not a rule because it would not have a "potential impact" on the rights of the Associations or their members.<sup>120</sup> The court rejected the Associations' contention that the harms they alleged demonstrated that the list and the resulting TMDL standards would have a potential impact on their rights.<sup>121</sup> The court reasoned that the Associations' "hypothesized harms resulting from potential future regulations" did not constitute a potential impact since the harms were not a direct result of the impaired waters list itself, and were "premised on a vast oversimplification of the long, complex, interdependent, and contingent" regulatory framework of the CWA, in which there is no "simple clockwork progression" from the impaired waters list to land use restrictions that may not ultimately be imposed.<sup>122</sup> Dismissing the challenge as prophesying the impact of a potential

114. *Id.* at 22.

115. *Id.*

116. *Id.* at 22-25 (citing MO. REV. STAT. § 536.010(4) (2000); *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974); *Baugus v. Dir. of Revenue*, 878 S.W.2d 39, 42 (Mo. 1994) (en banc); *BONFIELD*, *supra* note 37, §§ 3.1, 3.3.1; 1 *DAVIS & PIERCE*, *supra* note 3, § 6.1; 2 *id.* § 15.1).

117. *Mo. Soybean Ass'n*, 102 S.W.3d at 23.

118. *Id.*

119. *Id.* at 23 (discussing the "force of law" test articulated in *Pac. Gas & Elec. Co.*, 506 F.2d at 38).

120. *Id.* at 24.

121. *Id.*; see also *supra* note 25 (listing the harms alleged by the Associations).

122. *Mo. Soybean Ass'n*, 102 S.W.3d at 24. ("Stricter regulatory controls will not occur, if at all, until after the EPA approves the State's nominated list, TMDL development is scheduled, studies are performed, the total maximum daily load of pollutants are calculated, an implementation plan is drawn up with a description of the control actions to be taken and a schedule for their implementation, the TMDL is approved by the EPA, incorporated into the State's [continuing planning process], and the implementation plan is put into effect through further permit restrictions or other regulations.")

rule—the impaired waters list—rather than the potential impact of a rule—the ultimate land use restrictions—the court reasoned that the list did not have a potential impact on anyone’s legal rights, so it could not be a rule.<sup>123</sup>

The dissent would have declared the list void as a rule not promulgated in accordance with MAPA’s rulemaking procedures.<sup>124</sup> The dissent concluded that the impaired waters list fit MAPA’s definition of a “rule” because it was a statement of general applicability that acted “on unnamed and unspecified [persons and] facts” and had “the potential to affect millions of Missourians.”<sup>125</sup> The impaired waters list also fit MAPA’s definition because it prescribed and implemented state and federal environmental policy by identifying waterbodies as the subject of state and federal efforts to control water pollution and improve water quality.<sup>126</sup> The dissent also concluded that the Associations’ claims of harm were more than sufficient to constitute a “potential impact,” since now that the Rivers had been included, TMDLs *must* be developed and land use restrictions *must* be imposed to ensure compliance with those TMDLs.<sup>127</sup> Since the dissent believed the Associations’ alleged

123. *Id.* at 24. The Associations also argued that the list was a rule because the Missouri Clean Water Law requires the Commission to act by rule when it acts with regard to the CWA. *Id.* at 25 n.21. The court rejected this argument in a footnote. *Id.* The court also rejected in a footnote the Associations’ claim that the 2002 amendment to the CWA made the 1998 list a rule. *Id.* at 25 n.23; *see also supra* notes 94-96 and accompanying text (discussing the 2002 amendment to the Missouri Clean Water Law). The court expressly reserved the question of whether the impaired water list constituted “intergovernmental communication” between MDNR and the EPA, the grounds upon which the appellate court had held the list exempt from MAPA’s rulemaking requirements. *Mo. Soybean Ass’n*, 102 S.W.3d at 25 n.22.

124. *Id.* at 29-30 (Limbaugh, C.J., dissenting).

125. *See id.* at 30 (Limbaugh, C.J., dissenting) (citations omitted) (quoting *NME Hosps., Inc., v. Dep’t of Soc. Servs.*, 850 S.W.2d 71, 74 (Mo. 1993) (en banc)) (alteration in original).

126. *Id.* at 30-31 (Limbaugh, C.J., dissenting). The dissent argued that the impaired water lists implements and prescribes the state’s public policy as expressed by the Missouri Clean Water Law and the federal CWA. *Id.* (Limbaugh, C.J., dissenting). The Missouri Clean Water Law declares that it is the public policy of the state to conserve [and protect] the waters of the state and to protect, maintain, and improve the quality thereof . . . to provide for the prevention, abatement and control of new or existing water pollution; and to cooperate with other agencies of the state . . . [and] the federal government . . . in carrying out these objectives.

MO. REV. STAT. § 644.011 (2000). The CWA expresses a similar public policy with respect to water quality. *See* 33 U.S.C. § 1251(a) (2000). The dissent reasoned that when a state compiles an impaired waters list, it does so with the aim of “prescribing” and “implementing” both of these policies. *Mo. Soybean Ass’n*, 102 S.W.3d at 30 (Limbaugh, C.J., dissenting).

127. *Mo. Soybean Ass’n*, 102 S.W.3d at 30 (Limbaugh, C.J., dissenting). The dissent also argued that the Associations would suffer a real and immediate “potential impact” as a direct result of the list because the Associations would be subjected to

harms were sufficient for the list to be considered a rule, the dissent would have declared the list void because it was not promulgated in accordance with MAPA.<sup>128</sup>

The dissent likewise criticized the majority's ripeness holding,<sup>129</sup> which was based in part on the Eighth Circuit's dismissal of the Missouri Soybean Association's challenge to the EPA's approval of Missouri's impaired waters list.<sup>130</sup> Like the Eighth Circuit Court of Appeals, the Missouri Supreme Court based its ripeness holding on *Ohio Forestry Ass'n v. Sierra Club*,<sup>131</sup> in which the U.S. Supreme Court applied the two-part *Abbott* test to hold not ripe a challenge to the U.S. Forest Service's management plan for the Wayne National Forest.<sup>132</sup> The *Ohio Forestry* court concluded that delaying review would not cause significant hardship to the parties because the forest management plan itself did not command the parties to do or to refrain from doing anything, and that although the management plan made logging in the forest more likely, the Forest Service still had to perform a number of actions before such logging could be permitted, each of which could be challenged administratively or in court.<sup>133</sup> The *Ohio Forestry* Court also concluded that the challenge was not fit for judicial resolution in light of the need for further factual development in the context of specific logging proposals.<sup>134</sup>

Like the Eighth Circuit Court of Appeals, the Missouri Supreme Court analogized the impaired waters list to the U.S. Forest Service's plan at issue

further rulemaking efforts with the development of TMDLs and land use restrictions. *Id.* (Limbaugh, C.J., dissenting).

128. *Id.* at 32-33 (Limbaugh, C.J., dissenting). There was no dispute that the agency had failed to file a notice of proposed rulemaking with the Secretary of State that disclosed the agency's intent to include the Rivers on the list. *Id.* (Limbaugh, C.J., dissenting). The agency also failed to follow MAPA rulemaking procedures by failing to "publish a proposed or final order of rulemaking listing the Rivers in the Missouri Register." *Id.* at 33 (Limbaugh, C.J., dissenting). Both of these failures constituted violations of Missouri Revised Statute Section 536.021.1 (2000). *Mo. Soybean Ass'n*, 102 S.W.3d at 33 (Limbaugh, C.J., dissenting).

129. *Mo. Soybean Ass'n*, 102 S.W.3d at 31-32 (Limbaugh, C.J., dissenting).

130. *Id.* at 28-29; *see also* *Mo. Soybean Ass'n v. United States EPA*, 289 F.3d 509, 512-13 (8th Cir. 2002).

131. 523 U.S. 726 (1998).

132. *Mo. Soybean Ass'n*, 102 S.W.3d at 27-28 (discussing *Mo. Soybean Ass'n*, 289 F.3d at 509 and *Ohio Forestry Ass'n*, 523 U.S. 726).

133. *Id.* at 27-28 (citing *Ohio Forestry Ass'n*, 523 U.S. at 733-34).

[B]efore the Forest Service could permit logging, it had to: (a) propose a particular site and specific harvesting method, (b) ensure that the project was consistent with the overall plan, (c) provide affected parties with notice and an opportunity to be heard, (d) conduct an environmental impact analysis of the project, and (e) make a final decision to permit logging . . . .

*Id.* at 27 (citing *Ohio Forestry Ass'n*, 523 U.S. at 729-31).

134. *Id.* at 28 (citing *Ohio Forestry Ass'n*, 523 U.S. at 736).

in *Ohio Forestry*.<sup>135</sup> Like the forest management plan, the impaired waters list “[did] not command [the Associations] to do anything, nor refrain from doing anything.”<sup>136</sup> Also like the forest management plan, many agency actions had to be taken before land use restrictions to control “water pollution [would] not come into play, if at all.”<sup>137</sup> Concluding that review now would be based on speculation and generalities, the Missouri Supreme Court majority held that the challenge to the impaired waters list was not ripe for judicial review.<sup>138</sup>

The dissent criticized this holding because “the issue of ripeness was not raised, briefed or argued by either party,” and it was premised exclusively on federal ripeness jurisprudence, when Missouri standing law is more lenient.<sup>139</sup> Citing MAPA’s provision conferring standing on “[a]ny person who is or *may* be aggrieved” by an agency rule, the dissent argued that a party who establishes standing “has necessarily succeeded in demonstrating that the case is also ripe.”<sup>140</sup> Because the dissent believed the Associations had shown that they “may be aggrieved” in the future by the impaired waters list, the dissent would have held the challenge ripe for review.<sup>141</sup>

Notwithstanding the dissent’s criticisms, the majority urged the Associations to “sheath their swords until . . . regulations impacting them are proposed” because then, and only then, could the Associations “slay the regulatory dragon that they have presently conjured out of thin air.”<sup>142</sup> The court rebuffed what it called the Associations’ attempt to get an early bite of the apple by trying to thwart “governmental consideration of whether an apple tree should even be planted.”<sup>143</sup> Accordingly the court dismissed the challenge, holding that the impaired waters list was not a rule and that the dispute could not be resolved by declaratory judgment because it was not ripe for adjudication.<sup>144</sup>

## V. COMMENT

*Missouri Soybean Association* could further muddy the already murky waters of judicial review of agency policy statements. If so, the decision may

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135. *Id.* at 28 (citing *Mo. Soybean Ass’n v. United States EPA*, 289 F.3d 509 (8th Cir. 2002) (per curiam)).

136. *Id.* at 29.

137. *Id.*

138. *Id.*

139. *Id.* at 31-32 (Limbaugh, C.J., dissenting).

140. *Id.* at 32 (Limbaugh, C.J., dissenting) (discussing MO. REV. STAT. § 536.053 (2000)).

141. *Id.* (Limbaugh, C.J., dissenting).

142. *Id.* at 29. To this end the court modified the judgment of dismissal to be without prejudice, allowing the Associations to play “dragon slayer” another day. *Id.*

143. *Id.* at 24.

144. *Id.* at 29.

alter both the legislatively delineated relationship between agencies and the courts, as well as the public's role in agency processes.

In applying the pragmatic doctrine of ripeness to withhold review, the court strikes the balance in favor of protecting the agency from judicial interference until the CWA's "long, complex, interdependent, and contingent" regulatory scheme can be further implemented.<sup>145</sup> Protection from judicial second-guessing can be an important protection for agency policymaking in the context of such a regulatory scheme; it weighs all the more heavily in the ripeness balance when withholding review would not result in hardship to the challenging party.<sup>146</sup>

Assuming that the opportunity for judicial review later in the agency's implementation of the regulatory scheme mitigates any hardship caused by withholding review earlier in the implementation, it is appropriate for the court to tip the balance in favor of protecting the agency's policymaking prerogatives. But this assumption may not hold in the context of "long, complex, interdependent, and contingent" regulatory schemes like the CWA where agencies engage in a significant amount of pre-implementation planning and the implementation itself proceeds in "discrete, often irreversible, steps."<sup>147</sup> In 1989, then-Judge Steven Breyer recognized this problem, noting that:

[A]s time goes on, it will become ever more difficult to undo an improper decision . . . . The relevant agencies and the relevant interest groups . . . may become ever more committed to the action initially chosen. They may become ever more reluctant to spend the ever greater amounts of time, energy and money that would be needed to undo the earlier action and to embark upon a new and different course of action. And the court . . . cannot force the agency to choose a new course of action. Given the realities, the farther along the initially chosen path the agency has trod, the more

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145. *Id.* at 24-26.

146. *Abbott Labs., Inc. v. Gardner*, 387 U.S. 136, 148-49 (1967), *abrogated by* *Califano v. Sanders*, 430 U.S. 99 (1977). Here the Associations could seek to prevent any hardship by challenging, administratively and judicially, each and every TMDL standard and land use restriction proposed before any could be applied to specific waterbodies, just as the groups in *Ohio Forestry* had ample opportunities to challenge each and every specific logging proposal. *Mo. Soybean Ass'n*, 102 S.W.3d at 29 (stating that "[t]he [Associations] are free to again seek the court's intervention if any regulation is proposed . . . [but the Associations] are urged to sheath their swords until . . . regulations impacting them are proposed"). See also, e.g., *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990) (dismissing on ripeness grounds a challenge to an agency "program").

147. See generally Cohen, *supra* note 51, at 554-58.

likely it becomes that any later effort to bring about a new choice . . . will prove an exercise in futility.<sup>148</sup>

Pre-implementation judicial review is particularly critical to counteract the “bureaucratic steamroller” effect in environmental regulatory schemes since in that context controversies most frequently arise during the planning stages—after the agency has set its policy direction, but before it has begun to implement its plan or enforce its regulations.<sup>149</sup> It is during these stages, however, that courts are the most reluctant to review agency actions, due in large part to the greater potential for judicial interference with the agency’s policymaking prerogatives.<sup>150</sup> Reluctance to review agency action during the planning stages may also be based on a judicial misconception of the regulatory process that treats only the end product—the ultimate TMDL standards and land use regulations—rather than the planning process leading up to the end product—determining that the Rivers will be subject to such standards—as the proper subject of review.<sup>151</sup> Such a misconception ignores the irreversibility of agency actions, and it is particularly troubling in the context of environmental regulation where “once the bureaucratic steamroller starts lumbering forward, resources may be depleted or ecosystems destroyed, undermining the utility of future judicial review.”<sup>152</sup>

A more appropriate conception of a “long, complex, interdependent, and contingent” regulatory scheme like the CWA would acknowledge the “bureaucratic steamroller” effect by recognizing that such regulatory schemes contemplate “a series of discrete rulemaking efforts, not a single process . . . culminat[ing] in final or ultimate” rules.<sup>153</sup> Consequently, courts should permit review of a “threshold determination” like the inclusion of the Rivers to mitigate the decisional inertia of the “bureaucratic steamroller,” since it is precisely this “steamroller effect” that gives a threshold determination a significant practical impact.<sup>154</sup>

The *Missouri Soybean Association* court, however, refused to review such a threshold determination, relying heavily on the ripeness doctrine as applied by the U.S. Supreme Court in *Ohio Forestry Ass’n v. Sierra Club*.<sup>155</sup> However, this reliance is misplaced since the “bureaucratic steamroller effect” in regulatory schemes requiring “cooperative federalism” is less pronounced in the exclusively federal regulatory framework of the National For-

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148. *Sierra Club v. Marsh*, 872 F.2d 497, 503-04 (1st Cir. 1989).

149. Cohen, *supra* note 51, at 554-55.

150. See, e.g., *Ohio Forestry Ass’n*, 523 U.S. at 734.

151. *Mo. Soybean Ass’n*, 102 S.W.3d at 31 (Limbaugh, C.J., dissenting) (discussing this conception of the CWA regulatory scheme).

152. Cohen, *supra* note 51, at 555.

153. *Mo. Soybean Ass’n*, 102 S.W.3d at 31 (Limbaugh, C.J., dissenting).

154. See *id.* (Limbaugh, C.J., dissenting).

155. 523 U.S. 726 (1998); see also *supra* notes 129-38 and accompanying text.



est Management Act ("NFMA") at issue in *Ohio Forestry*.<sup>156</sup> But despite the obvious differences between the two regulatory frameworks, perhaps the pragmatic rationale for employing the ripeness doctrine is similar in both cases. By withholding review during the planning stages, the courts in both cases deferred to the agencies in setting their own policy priorities and in collecting the raw data necessary to make the highly technical determinations both regulatory schemes require.<sup>157</sup> In fact, this pragmatic rationale may be even stronger in the context of the cooperative regulatory framework of the CWA because judicial invalidation of any component of this interdependent process may hinder the entire process through missed deadlines and otherwise altered implementation timetables.<sup>158</sup> In this way the ripeness doctrine gives the agency the flexibility it may need to implement the CWA regulatory scheme, while at the same time ensuring that ill-timed judicial intervention does not interrupt the interdependent framework of state and federal cooperation.<sup>159</sup>

However, withholding review of an agency policy statement that largely determines the direction that the implementation of a complex regulatory scheme will take may fail to promote this pragmatic objective. Here, withholding review did not defer to agency expertise because it was the political arm of the agency that listed the Rivers, while the expert arm counseled against such an action.<sup>160</sup> Withholding review here also failed to ensure that

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156. Compare *Ohio Forestry Ass'n*, 523 U.S. at 728-30 with, e.g., *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-29 (9th Cir. 2002). The states have no role in the implementation of the NFMA, while the entire CWA framework is premised on the notion that the states have the primary responsibility for developing and implementing state-specific water pollution control policies. See *supra* notes 82-84 and accompanying text (discussing *Sierra Club v. United States EPA*, 162 F. Supp. 2d 406, 419-20 (D. Md. 2001)). Under the NFMA, the Secretary of Agriculture develops standards for federal lands with absolutely no input from the states, while under the CWA states develop water quality standards, impaired waters lists, TMDL standards resulting from the lists, and land use restrictions required to ensure compliance with the TMDL standards. See generally *Pronsolino*, 291 F.3d at 1126-29.

157. See *Mo. Soybean Ass'n*, 102 S.W.3d at 28 (quoting *Ohio Forestry Ass'n*, 523 U.S. at 736).

158. *Id.* at 24 (discussing the interrelatedness of state and federal action in the TMDL process).

159. *Id.* at 26 (quoting *Abbott Labs., Inc. v. Gardner*, 387 U.S. 136, 148-49 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977)).

160. *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, No. WD59650, 2002 Mo. App. LEXIS 49, at \*10-12 (Mo. Ct. App. Jan. 15, 2002), *superseded by* 102 S.W.3d 10 (Mo. 2003) (en banc). MDNR's rationale for not recommending the Rivers was two-fold: it made the technical judgment that it lacked sufficient information to determine whether TMDL standards could or should be developed for the Rivers, and it made the political and technical judgment that the Rivers could be better protected by a comprehensive solution coming at the national level. *Id.* at \*10-11. MDNR recognized that the Rivers are of national importance and must be protected, but looked to

judicial review early in an interdependent regulatory scheme does not derail the entire process, since review here would have had little impact on the overall implementation of the CWA's regulatory scheme.<sup>161</sup> In this way, the pragmatic rationales underlying the ripeness doctrine are inapplicable, making use of the doctrine especially inappropriate when advanced at the expense of fidelity to the rulemaking procedures of MAPA.

Withholding review of an agency policy statement based on judicially defined doctrines like ripeness, instead of on the express statutory language of the CWA, the Missouri Clean Water Law, and MAPA undermines the relationship between courts and agencies these acts define. The *Missouri Soybean Association* court applies the *Abbott Laboratories* test to determine that the challenge to the list is unripe, but it ignores *Abbott Laboratories'* other injunction that an agency action has a "presumption of judicial review" unless there is "clear and convincing evidence" of the legislature's intent to preclude such review.<sup>162</sup> Here, there was no allegation that the legislature sought to

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the U.S. Congress to build upon existing efforts for the restoration of the Rivers. *Id.* at \*11. The Commission is a political body, as opposed to an expert one, "consist[ing] of seven members appointed by the governor with the advice and consent of the senate." MO. REV. STAT. § 644.021.1 (2000 & Supp. 2003). Two members represent and protect the needs of agriculture, industry, and mining; one member represents "the needs of publicly owned wastewater treatment works;" and four members represent "the public." *Id.* The members must demonstrate "interest and knowledge about water quality" and must be qualified "to provide, assess and evaluate scientific and technical information concerning water quality, financial requirements and the effects of the promulgation of standards, rules and regulations." *Id.* Despite their qualifications, the members do not have the same expertise in the day to day implementation of water pollution control programs as the MDNR, since members serve just four year terms and meet only four times a year. *Id.* §§ 644.021.2-.3. Consequently, although the court gave deference to the political arm of the agency, it cannot necessarily be said that the court deferred to agency expertise.

161. By the time the instant litigation arose in the ongoing saga of Missouri's impaired waters list, the EPA had already approved the list and a challenge to its approval had been dismissed by the Eighth Circuit Court of Appeals. *Mo. Soybean Ass'n v. United States EPA*, 289 F.3d 509, 513 (8th Cir. 2002) (per curiam). So whether the Missouri Soybean Association likes it or not, EPA approval triggers the state's responsibility to develop TMDL standards for the listed waters. *Mo. Soybean Ass'n*, 102 S.W.3d at 29. A decision striking down Missouri's submitted list as a rule improperly promulgated in violation of MAPA would not undo this responsibility, and even if it did, EPA would then develop its own impaired waters list for Missouri that would look substantially similar to the one already approved. "When states fail to perform their duties [under the CWA] adequately, EPA is generally required to perform them on the states' behalf." *Am. Canoe Ass'n, v. United States EPA*, 30 F. Supp. 2d 908, 912 (E.D. Va. 1998) (citing 33 U.S.C. §§ 1313(b), (d)(2) (2000)).

162. *Abbott Labs.*, 387 U.S. at 140-41. The United States Supreme Court has further developed this "clear and convincing evidence" standard by imploring courts to look at the regulatory scheme as a whole to determine whether the legislature in-

preclude judicial review of impaired waters lists, nor could such an allegation be made since the structure of the entire regulatory scheme defined by the Missouri Clean Water Law and the CWA, as well as the framework for agency action and judicial review defined by MAPA, demonstrate a legislative intent that such review be made available.

The CWA supports the conclusion that judicial review was intended to be available for all agency policy statements implementing the act, including impaired waters lists. The overall scheme of the CWA leaves to the states the primary responsibility for developing and implementing water pollution control policies.<sup>163</sup> The CWA, federal regulations implementing it, and federal cases interpreting it suggest that states are engaged in rulemaking when they develop impaired waters lists as required by the CWA.<sup>164</sup> Consequently, the CWA appears not only to permit judicial review of impaired waters lists, but also to compel it, as impaired waters lists are considered the end-product of state rulemaking efforts.

Likewise, the Missouri Clean Water Law, which empowers MDNR and the Commission to implement the CWA, also suggests that judicial review be afforded to agency policy statements like an impaired waters list. The Missouri Clean Water Law provides for judicial review of any action taken by the Missouri Clean Water Commission.<sup>165</sup> This alone seems to support judicial review,<sup>166</sup> but taken with the General Assembly's amendment to the Missouri Clean Water Law explicitly requiring that all future impaired waters lists be adopted in accordance with MAPA's rulemaking procedures, judicial review of impaired waters lists is now compelled.<sup>167</sup>

Like the CWA and the Missouri Clean Water Law, MAPA also delineates a relationship between agencies and the courts in which the widest possible array of agency policy statements are intended to be the subject of judicial review. The broad sweep of MAPA's standing provision, conferring standing on "[a]ny person who is or *may be aggrieved* by" an agency action,<sup>168</sup> suggests an intent to extend standing to those who may be aggrieved *in the future*, thus expanding the availability of judicial review of agency policy statements early in the implementation of a regulatory scheme and constraining the court's freedom to deem an agency policy statement unripe.<sup>169</sup>

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tended to preclude review. *Block v. Cmty. Nutrition Inst., Inc.*, 467 U.S. 340, 346 (1984).

163. MO. REV. STAT. § 644.036.5 (Supp. 2003).

164. *See supra* Part III.C.

165. MO. REV. STAT. § 644.071 (2000).

166. Because the Associations did not preserve the issue on appeal, the court declined to reach it. *Mo. Soybean Ass'n*, 102 S.W.3d at 25 n.21.

167. Act of July 11, 2002, No. 984, § A, 2002 Mo. Laws 963, 986 (codified as amended at MO. REV. STAT. § 644.036.5 (Supp. 2003)).

168. MO. REV. STAT. § 536.053 (2000) (emphasis added).

169. *Mo. Soybean Ass'n*, 102 S.W.3d at 31-32 (Limbaugh, C.J., dissenting).

Judicial amendment of MAPA's definition of a "rule" is also inconsistent with the legislatively-delineated relationship between agencies and the courts. The definition explicitly includes any generally applicable statement of agency policy, so long as the statement does not fall within one of the thirteen specific exemptions.<sup>170</sup> Comparing this definition with the federal APA's definition—which exempts agency policy statements—demonstrates that the Missouri General Assembly intended to require rulemaking procedures and to make judicial review available for a much wider array of agency policy statements than does Congress.<sup>171</sup> The absence of an agency policy statement exemption in MAPA is even more notable in light of the thirteen specific exemptions MAPA does provide, evincing the General Assembly's intent that any agency statement of general applicability be reviewable as a rule, *unless* it falls within these specific exemptions,<sup>172</sup> rather than *unless* it falls within a judicially-created exception.<sup>173</sup>

Carving out judicially-crafted exceptions to MAPA is even more troubling because it is inconsistent with the court's own precedent interpreting

170. MO. REV. STAT. § 536.010(4).

171. Compare *id.* (containing thirteen specific exemptions but not exempting agency policy statements) with 5 U.S.C. § 551(4) (2000) (exempting agency policy statements). See also *supra* note 54.

172. See BONFIELD, *supra* note 37, § 3.3.5 (discussing the difference in drafting techniques for exemptions between the 1961 MSAPA and the 1981 MSAPA). MAPA is based on the 1961 MSAPA. See also *supra* note 55.

173. In this sense, the appellate court's decision demonstrated greater fidelity to the text of MAPA by straining to put the list in the "intergovernmental communication" exemption to MAPA's definition. However, the appeals court noted that such a holding conflicted with holdings of federal courts that the states engaged in rulemaking when they developed impaired waters lists and with the plain language of the Missouri Clean Water Law that all determinations of the Commission are subject to judicial review. *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, No. WD59650, 2002 Mo. App. LEXIS 49, at \*47-49 (Mo. Ct. App. Jan. 15, 2002), *superseded by* 102 S.W.3d 10 (Mo. 2003) (en banc). A holding that the list was not a rule because it fell within one of the exemptions would have at least been consistent with the relationship between the agencies and the courts delineated by the General Assembly, while at the same time, would have dissipated some of the "considerable smog" surrounding the distinction between those agency policy statements that are rules, and those that are not. However, the appellate court's decision would lead to its own difficulties. By holding that the impaired waters list falls within the "intergovernmental communication" exemption, the court also effectively exempts the TMDL standards since they too are "intergovernmental communications." *Id.* at \*47-49. The holding also created a greater conflict between MAPA and the Missouri Clean Water Law, which specifically provides for judicial review of all actions by the Commission in implementing the CWA. *Id.* at \*48-49 (discussing MO. REV. STAT. § 644.071 (2000)). The amendment to the Missouri Clean Water Law, requiring all future impaired waters lists to be adopted pursuant to the rulemaking and judicial review procedures of MAPA, eliminates this conflict. See Act of July 11, 2002, No. 984, § A, 2002 Mo. Laws 983, 986 (codified at MO. REV. STAT. § 644.036 (Supp. 2003)).

MAPA. In this case the court shifts the potential impact inquiry from whether there *could be* harm from an agency policy statement, to whether there *has been* harm as a result of the policy statement.<sup>174</sup> Whereas the “potential impact” criterion has been read previously to cast a wide net of judicial review, the *Missouri Soybean Association* court transforms it into a barrier to obtaining judicial review of an agency policy statement, even when the statement will have a significant practical or legal impact in the future.<sup>175</sup>

In concluding that the laundry list of harms alleged by the Associations’ did not satisfy the formerly loose “potential impact” requirement, the court reasoned that the harms alleged would result from future rules based on the policy embodied in the list rather than from the list itself, noting that there is no “clockwork progression” from the list to future rules.<sup>176</sup> This reasoning ignores not only the fact that the list triggers the “bureaucratic steamroller,”<sup>177</sup> but also that a list that includes the Rivers creates a greater *potential* for the alleged harms than a list omitting the Rivers. Under the “potential impact” test, this greater potential impact should be enough to make an otherwise generally applicable policy statement a rule subject to judicial review.<sup>178</sup>

The inconsistency of the court’s holding in the instant case, both with the CWA, the Missouri Clean Water Law, and MAPA, as well as with the court’s own precedent, is all the more noteworthy in light of the court’s express desire for a consistent outcome with the Eighth Circuit’s dismissal of the Association’s federal court challenge to EPA approval of Missouri’s 1998 list.<sup>179</sup> Although the dismissals for lack of ripeness are somewhat consistent, the circumstances surrounding the two challenges are anything but—the federal court challenge was on substantive rather than procedural grounds;<sup>180</sup>

174. The Associations alleged that the Rivers’ inclusion on the impaired waters list “will necessitate: changes in land management practices; limitation on sales and use of fertilizers, pesticides, and herbicides; increased costs in satisfying new pollution standards; increased costs of water treatment; and limitations on raw materials that can be used in production or manufacturing.” *Mo. Soybean Ass’n*, 102 S.W.3d at 31 (Limbaugh, C.J., dissenting); see also *id.* at 23-25.

175. *Id.*; see also *Baugus v. Dir. of Revenue*, 878 S.W.2d 39, 42 (Mo. 1994) (en banc).

176. *Mo. Soybean Ass’n*, 102 S.W.3d at 23-25.

177. See *supra* notes 148-56 and accompanying text.

178. *Mo. Soybean Ass’n*, 102 S.W.3d at 24.

179. “Clearly, if the challenge to the federal government’s approval of the list of impaired waters is not ripe for [review], so too must the challenge to the State’s . . . nomination of the waters be unripe. Neither the law nor our rivers would be clarified by inconsistent holdings.” *Id.* at 28-29 (discussing *Mo. Soybean Ass’n v. United States EPA*, 289 F.3d 509 (8th Cir. 2002) (per curiam)).

180. In federal court the Association contended that the EPA should have disapproved Missouri’s impaired waters list “because some of the listed waters lacked documentation.” *Mo. Soybean Ass’n*, 289 F.3d at 511. In state court, the Associations contended that MDNR and the Commission failed to follow MAPA’s rulemaking procedures. *Mo. Soybean Ass’n*, 102 S.W.3d at 21.

Missouri ripeness law is more lenient than federal;<sup>181</sup> the federal court challenge was under the federal APA, not MAPA;<sup>182</sup> and the federal court challenge was to the EPA's approval of the list, not to Missouri's submission.<sup>183</sup> Although these key differences between the challenges to the list in state and federal court call the court's consistency rationale into question, the consistency rationale all but fails in light of federal court decisions holding that a state's development of an impaired waters list is rulemaking, in diametric opposition to the position articulated by the majority in the instant decision.<sup>184</sup>

Despite the analytical and doctrinal difficulties with the instant decision, its most troubling aspect is the "no harm, no rule" approach it advocates; an approach that is in sharp contrast to the numerous heavy-handed holdings from Missouri courts invalidating agency rules for even minor transgressions of MAPA's rulemaking procedures.<sup>185</sup> In these decisions, courts reasoned that MAPA means exactly what it says: rules adopted in violation of the applicable rulemaking procedures "are void and of no force or effect."<sup>186</sup> Here there was no dispute that the agency failed to follow the required rulemaking procedures—a failure which would normally have proven fatal to the agency's final product.<sup>187</sup> But under the "no harm, no rule" approach adopted by the court, such transgressions are excused by virtue of judicial manipulation of MAPA's definition of a "rule" and the court's own interpretations of that definition, and by the *ad hoc* and ill-defined ripeness doctrine. Such an approach undermines the goal of fundamental fairness in agency processes that rulemaking procedures seek to ensure.<sup>188</sup>

A "no harm, no rule" approach could lead to technically unsound agency decision making where, as here, the agency's political arm takes an action that the agency's expert arm rejects.<sup>189</sup> The "no harm, no rule" approach also

181. *Mo. Soybean Ass'n*, 102 S.W.3d at 31-32 (Limbaugh, C.J., dissenting).

182. *Compare Mo. Soybean Ass'n*, 289 F.3d at 511, with *Mo. Soybean Ass'n*, 102 S.W.3d at 14.

183. *Id.*

184. *See supra* notes 82-85 and accompanying text. The Eighth Circuit dismissed the Associations' challenge solely on ripeness grounds, so the court did not directly address the issue, but other federal courts have held that it is the states, and not EPA, who engage in rulemaking by developing and submitting impaired waters lists. *See supra* notes 82-84 and accompanying text. The appellate court in the instant case recognized this inconsistency, but the Missouri Supreme Court made no mention of it. *Compare Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, No. WD59650, 2002 Mo. App. LEXIS 49, at \*46-48 (Mo. Ct. App. Jan. 15, 2002), *superseded by* 102 S.W.3d 10 (Mo. 2003) (en banc), with *Mo. Soybean Ass'n*, 102 S.W.3d at 28-29.

185. *See supra* notes 46-48 and accompanying text.

186. *Mo. Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380, 392 (Mo. Ct. App. 1994); *see also supra* notes 46-48 and accompanying text.

187. *Mo. Soybean Ass'n*, 102 S.W.3d at 32-33 (Limbaugh, C.J., dissenting).

188. *See supra* Part III.A.

189. MDNR did not have enough information to form an adequate scientific basis for including the Rivers, and even after the Commission abruptly included them in

fails to ensure that the public has adequate notice by condoning an agency's failure to communicate the gravity and significance of the actions it is proposing.<sup>190</sup> The "no harm, no rule" approach also fails to ensure that agency actions are politically acceptable where, as here, the public lacks adequate notice of the proposed agency action and where the agency's judgment of the political ramifications of a particular decision are ignored.<sup>191</sup>

Despite the serious "potential impact" the instant decision may have on the relationship between agencies and courts and the level of rigor with which agencies adhere to MAPA rulemaking procedures, these impacts may be limited by the *sui generis* nature of the Rivers as two of the largest waterbodies in the United States. The decision's legal effect may likewise be limited because a contrary decision would have had the same practical impact, and the

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contravention of MDNR's recommendations, MDNR designated them as waterbodies requiring more study before it could be determined that TMDL standards could or should be developed. *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, No. WD 59650, 2002 Mo. App. LEXIS 49, at \*12-14 (Mo. Ct. App. Jan. 15, 2002), *superseded by* 102 S.W.3d 10 (Mo. 2003) (en banc). After the list was submitted, the EPA unraveled MDNR's attempted hedge by requiring MDNR to develop and implement TMDL standards for all the listed waterbodies despite MDNR's desire to conduct further studies. *Id.* at \*13-17.

190. Here the notices leading up to the development and submission of the impaired water list failed to communicate to the public the gravity of the proposed action—that MDNR and the Commission were considering a significant policy change regarding two of the largest waterbodies in the United States. To the contrary, the notices leading up the public hearing communicated precisely the opposite agency action, by explicitly stating that the Rivers would not be included. *Mo. Soybean Ass'n*, 102 S.W.3d at 32 (Limbaugh, C.J., dissenting). The Commission's abrupt inclusion of the Rivers was a substantial change from the proposed list, but there was no process to ensure that the public had adequate notice of this significant change.

191. Here MDNR, a politically unpopular and chronically under-funded state agency, punted a politically explosive issue to the federal government, but the Commission, as MDNR's political arm, intercepted after pressure from one side of the interest group spectrum. *See Mo. Soybean Ass'n*, 2002 Mo. App. LEXIS 49, at \*11-13. Despite the Commission's ostensibly political nature, this decision was not politically acceptable, as evidenced both by the court challenges launched by the most powerful agricultural, commercial, and industrial groups in the state, as well as the General Assembly's hasty amendment to the Missouri Clean Water Law. As political appointees meeting four times a year, the Commission enjoys luxuries that MDNR bureaucrats do not, in that the Commission will not be involved in the implementation of the decisions they make. MDNR's punt to the federal government asking for a comprehensive solution to control the pollution of the Rivers, represents a pragmatic decision that it would rather save its political capital for its day to day dealing with the regulated public instead of undermining its credibility and legitimacy by fighting over regulating two of the largest waterbodies in the country. It also represents a pragmatic judgment on MDNR's part that a comprehensive program for water pollution control at the national level is more appropriate for waterbodies running through numerous states than piecemeal regulation by the states. *Id.* at \*11.

General Assembly has decreed a contrary result with respect to all future impaired waters lists.<sup>192</sup> The two alternate holdings—both that the list is not a rule and that the challenge is not ripe for adjudication—also minimize the decision’s “potential impact.”

However, even if the decision’s legal effect is limited, it could nonetheless have significant practical impacts on agency behavior and public participation in the rulemaking process. This decision tells agencies that courts will tolerate less than perfect compliance with MAPA. This is good news to agencies, for which even informal rulemaking procedures can present substantial costs, costs made all the more acute in the restricted funding climate in which Missouri agencies currently find themselves. However, loose compliance with the required rulemaking procedures could negatively impact the public’s ability to gauge its role in agency processes by condoning agency procedures that convey mixed messages about the character of the agency action underway.<sup>193</sup>

The court’s willingness to employ the highly malleable ripeness doctrine also makes it more difficult for the public to gauge its role in agency processes by making the timing of judicial review less predictable. If review is withheld until far along in the process, meaningful review will be all but foreclosed since the “bureaucratic steamroller” will have by that point so committed itself to a policy direction and amassed substantial amounts of data supporting this direction that a court will be reluctant to order the agency to change course. Removing the possibility of meaningful judicial review reduces agency accountability to the affected public to an extent that goes far beyond mere deference to agency technical expertise. Taken to its extreme, a “no harm, no rule” approach to judicial review of agency policy statements could give the agency *carte blanche* to lay down standards with significant practical impact without a corresponding check from the judiciary and the public.

## VI. CONCLUSION

In *Missouri Soybean Ass’n v. Missouri Clean Water Commission*,<sup>194</sup> the Missouri Supreme Court wades into muddy waters, but instead of giving them clarity, it adds to their opacity. Numerous regulatory schemes require state and federal agencies to take a wide variety of interrelated actions. Affected parties will continue to ask Missouri courts to review agency actions taken along every step of the way in these lengthy, complex, and often con-

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192. A contrary decision would likely have resulted in the list standing, as approved by the EPA, notwithstanding the procedural violations by the state agency. See *supra* note 58 and accompanying text. All future impaired waters lists must be adopted as rules. See *supra* notes 94-96 and accompanying text.

193. See *supra* notes 76-78 and accompanying text.

194. 102 S.W.3d 10 (Mo. 2003).



troversial regulatory schemes. By manipulating MAPA and the court's own decisions construing it, and by demonstrating a willingness to apply the ill-defined and highly discretionary doctrine of ripeness, the *Missouri Soybean Association* court provides little guidance to courts, agencies, and the public as to whether a particular agency pronouncement is subject to judicial review. The court's decision clarifies "[n]either the law nor our rivers,"<sup>195</sup> and thus the muddy waters remain.

CHRISTOPHER R. PIEPER

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195. *Id.* at 29.